

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN EARL WRIGHT,

Defendant-Appellant.

UNPUBLISHED

March 20, 2003

No. 234645

Tuscola Circuit Court

LC No. 00-007939-FC

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); eight counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); and one count of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). Defendant was sentenced to concurrent terms of 18-1/2 to 30 years' imprisonment for each CSC I conviction, 10 to 15 years' imprisonment for each CSC II conviction, and 5 to 10 years' imprisonment for the assault conviction. He appeals as of right. We affirm, but remand for correction of the sentencing information report.

I. Facts

This case arises from allegations that defendant engaged in sexual activity with two female members of his household under the age of ten in the fall of 2000.

At the time of trial, A.B. was 10-1/2 years old. A.B. testified that she lived with her mother. However, she further stated that she occasionally stayed with defendant, whom she used to refer to as her dad. A.B. claimed that when she stayed overnight in defendant's home she slept in many different places. According to A.B., when she fell asleep one night with defendant's stepdaughter, C.G., defendant awakened her, escorted her to his own bedroom, and rubbed her "privates" and "bottom." The following day, A.B. alleged that defendant repeated these acts and then pushed her head down toward his "private" and told her to rub it. She stated that she resisted. A.B. reported that defendant brought her to his room on a third occasion and rubbed her as before. She added that, "then I had to rub his private and suck his private," which she described as "hard." A.B. testified to a fourth assault in defendant's bedroom: "Once again he opened my boxers and rubbed my private and bottom, and I had to suck his private." According to A.B., defendant told her that if she ever "told anyone that he was doing this, I would never be in his life again."

C.G. testified that she was presently ten years old, and that in October 2000 she lived in defendant's house. According to C.G., defendant twice touched her breasts when they were alone in the living room, causing her to feel nervous and afraid. Asked if defendant said anything to her about it afterward, C.G. replied, "The first time he said, 'Don't tell.'"

II. Defendant's Statement

Defendant argues that the trial court erroneously admitted testimony concerning statements he made to police. Specifically, defendant claims that these statements were inadmissible because they were made subsequent to his request for counsel. We disagree.

The trial court conducted a pretrial *Walker*¹ hearing to determine the admissibility of defendant's statements to the police. While we review the record of a suppression hearing de novo, a trial court's factual findings will not be disturbed on appeal unless clearly erroneous. *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Clear error exists when this Court is left with a definite and firm conviction that a mistake was made. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

The law requires that the police "advise a suspect before custodial interrogation that the suspect has the right to remain silent, that anything the suspect says may be used against him, and that the suspect has a right to the presence of retained or, if indigent, appointed counsel during questioning." *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001), citing *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). When an accused invokes his or her right to counsel, further questioning must cease. *People v Adams*, 245 Mich App 226, 230-231; 627 NW2d 623 (2001). Evidence obtained in violation of *Miranda* principles is subject to suppression. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997).

The prosecution bears the burden of establishing a valid waiver of a suspect's *Miranda* rights by a preponderance of the evidence. *Abraham, supra* at 645. Such a waiver must be made voluntarily, knowingly, and intelligently. *Howard, supra* at 538. "Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda* rights." *Abraham, supra* at 644-645. To determine the validity of a waiver, courts must examine the totality of the circumstances surrounding the interrogation. *Id.* at 645.

In this case, the arresting police officer testified that when he told defendant that he wanted to speak with him about an investigation, defendant asked, "Do I need an attorney?" He replied that the decision was up to defendant. The officer further stated that he repeated this answer when defendant asked the same question at the police station. However, the officer claimed that he assured defendant that the *Miranda* warnings would be provided momentarily and that defendant expressed a willingness make his decision regarding counsel after being so advised. According to the officer, defendant declined to answer certain questions after the *Miranda* warnings were given but never requested counsel or asked to stop the interview. The

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

officer testified that defendant invoked his right to remain silent only after making the inculpatory statements.

Defendant largely confirmed the police officer's testimony. However, defendant claimed that, both at home and at the police station, he stated, "I need an attorney." According to defendant, he felt "trapped" because the police told him he did not need an attorney. Defendant signed a statement waiving his *Miranda* rights, which stated the time as 5:10 p.m. The police officer testified that the waiver was signed before he questioned defendant. Conversely, defendant maintained that he actually signed the waiver after answering the officer's questions.

The trial court observed that defendant and the police officer provided, in important respects, "diametrically opposed" accounts, and that the two had opposing incentives to slant the facts. However, the trial court ultimately concluded that the police officer's testimony was more credible. The trial court further determined that the written document was an accurate reflection of the time and the fact that defendant waived his right to an attorney. Consequently, the trial court held that defendant's statements to police were voluntary and admissible.

Issues of witness credibility are for the trier of fact to decide and will not be resolved anew on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Accordingly, we defer to the trial court's finding that defendant asked only if he needed a lawyer, and did not affirmatively request one. Vague, generalized statements about possibly needing an attorney are insufficient to prohibit further police questioning; rather, the suspect's invocation of his rights must be unequivocal and unambiguous. *Adams, supra* at 231-234; *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). We also defer to the trial court's determination that defendant understood his rights, and signed the *Miranda* waiver form in reflection of that understanding before giving any incriminating statements. For these reasons, we conclude that the trial court properly admitted defendant's statements into evidence.

III. Evidence of Uncharged Sexual Misconduct

Defendant next asserts that the trial court erred when it admitted evidence that defendant had engaged in other alleged acts of sexual misconduct several years earlier. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

At trial, D.B. stated that in the early 1990s she was thirteen years old and lived in defendant's house with defendant, her mother, and her baby sister, complainant A.B. D.B. stated that defendant would "touch my breasts, my butt, just where he shouldn't be touching a little girl. He'd just walk by and grab my butt." The witness further claimed that defendant would sometimes drive her to a secluded location and perform these acts. D.B. also testified that defendant would get her out of bed when her mother was not home and have her perform oral sex on him in his bed. On one occasion, D.B. stated that defendant had her perform oral sex on him while her mother was laying right next to him. According to D.B., defendant would admonish her that if she refused his requests or told her mother, that "you guys are going to be homeless."

Evidence of other crimes or bad acts is generally inadmissible to prove an individual's propensity to act in conformity therewith. MRE 404(a); *People v Crawford*, 458 Mich 376, 383;

582 NW2d 785 (1998). However, other acts evidence may be admissible as “proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material” MRE 404(b)(1). We evaluate the admission of other acts evidence by considering whether: (1) it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

Because prior bad acts are not “intrinsically relevant to ‘motive, opportunity, intent, preparation, plan,’ etc.”, close scrutiny is required and reviewing courts “must vigilantly weed out character evidence that is disguised as something else.” *Crawford, supra* at 387-388. For purposes of admitting evidence of uncharged sexual misconduct in a criminal sexual conduct prosecution, the uncharged conduct must bear sufficient similarities to the charged conduct “beyond the mere commission of acts of sexual abuse.” *Sabin, supra* at 66.

In *Sabin, supra*, the Supreme Court determined that a sibling’s testimony concerning reports of sexual abuse similar to the complainant’s was admissible to show the defendant’s plan, scheme, or system. The Court in *Sabin, supra* at 66, noted that the charged and uncharged conduct in that case featured a similar relationship between the victims and the offender, was against victims of similar ages, and that the offender used similar tactics to guarantee the victim’s silence. The Court concluded that the fact some aspects of the charged and uncharged acts varied did not automatically render the evidence inadmissible. See *id.* at 67.

In this case, D.B.’s testimony was introduced to show defendant’s common scheme, plan or system for sexually molesting young girls. The testimony of these witnesses tended to reveal victims of similar age and familial relationship with the accused at the time of the alleged sexual misconduct. The witnesses also alleged that defendant made similar threats—invoking the specter of familial alienation—intended to guarantee their silence. Like the Court in *Sabin, supra*, we find that these similarities are sufficient to establish a common scheme, motive, or system. To the extent reasonable persons could disagree that the acts were sufficiently similar, we note that a trial court’s decision on a close evidentiary question does not ordinarily amount to an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Accordingly, we conclude that the trial court did not abuse its discretion in admitting D.B.’s testimony. Further, we note that the trial court instructed the jury on the limited relevance of this testimony. Jurors are generally presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

IV. Character for Truthfulness

Defendant also maintains that the trial court abused its discretion in admitting testimony concerning a witness’ character for truthfulness. We disagree.

In response to an alleged attack on C.G.’s credibility, the prosecution called Robin Wright, defendant’s wife and mother of C.G., to testify regarding her daughter’s propensity to tell the truth. Testimony concerning the credibility of a witness is permissible under MRE 608(a) when, “the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.” Thus, when defense counsel attacks a witness’ character for

truthfulness, the prosecutor may elicit testimony during direct examination that supports the victim's character for truthfulness. *People v Lukity*, 460 Mich 484, 489; 596 NW2d 607 (1999).

During his opening statements, defense counsel asserted that the evidence would show "that nothing ever happened with [C.G.]," implying that if C.G. testified to the contrary she would be lying. Defense counsel then compared this trial to the Salem Witch Trials where "girls would say that someone was a witch." In the course of cross-examining C.G., defense counsel also stressed an inconsistency between her present testimony and the testimony she gave during the preliminary examination while she was under oath. These remarks were clear attacks on C.G.'s character for truthfulness. For these reasons, the trial court did not abuse its discretion in admitting Ms. Wright's testimony concerning C.G.'s truthful character.

V. Prosecutorial Misconduct

Defendant raises several allegations of prosecutorial misconduct on appeal. He asserts that the prosecutor attempted to: (1) shift the burden of proof; (2) disparage defendant and defense counsel; and (3) urge the jury to convict out of sympathy for the victims or a sense of civic duty. We disagree.

Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). However, defendant has failed to preserve, with one exception, any of these issues for appellate review by objecting at trial. "Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Unpreserved constitutional error only warrants reversal if it is plain error affecting a defendant's substantial rights. *Carines, supra* at 763-764.

A. Burden Shifting

Defendant argues that the prosecution improperly shifted the burden of proof when it stated that defendant would simply explain away the fact that there was no motive for the complainants to lie. Because the prosecutor bears the burden of proof in a criminal case, the prosecutor may not argue that the defendant failed in some duty to prove his or her innocence. *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). We find no merit to defendant's claim in this respect. Rather, the prosecutor's remarks in this case were responsive to defendant's repeated claims that this trial was akin to the "Salem Witch trials" and that the complainants were not credible. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Moreover, the jury was specifically instructed that the burden of proof rested exclusively with the prosecutor and that defendant was presumed innocent. See *Dennis, supra* at 581. Defendant has consequently failed to establish plain error. *Carines, supra* at 763-764.

B. Denigrating the Defense

Defendant notes several instances where he claims the prosecution's comments were intended to disparage the defense. A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659

(1995). Similarly, a prosecutor may not personally attack defense counsel, or otherwise endeavor to shift the jury's focus from the evidence to defense counsel's personality. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Defendant asserts that the prosecutor characterized some of defense counsel's questions as "ridiculous." However, what the prosecutor actually said to A.B. on redirect examination was, "this will probably sound like a bit of a ridiculous question, [b]ut there's been a few of those questions already." Thus, only by indirect implication was the defense included within this stray commentary. Moreover, the trial court sustained a defense objection to the suggestion that ridiculous questions had been asked. Accordingly, appellate relief is not warranted.

Defendant also takes issue with the following statements made by the prosecutor during closing argument:

I ask you to compare and . . . contrast the style of questions that were asked by myself versus that of the defense attorney.

When [A.B.] was on the witness stand and being questioned by the People, I would suggest to you she was testifying. When she was being questioned by the defense attorney, he was testifying. . . . The questions ending with right? Isn't that correct? And a 10th of a second between each question.

However, defendant fails to cite any authority for the proposition that it is improper for a prosecutor to remind the jury that defense counsel took full advantage of the prerogative to lead a witness on cross-examination. The prosecutor's remarks in this case were not an improper disparagement of the defense; rather, they were an appropriate reminder to the jury to consider all the nuances attendant to A.B.'s testimony. When the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987); see also *Schutte*, *supra* at 722.

Defendant subsequently asserts that the prosecutor improperly accused defense counsel of attempting to wear down and confuse a young witness. Specifically, defendant cites the following question that the prosecutor posed to the jury during closing argument: "[h]ow hard is it really to confuse a 10 year old child about collateral issues, or about other circumstances above and beyond what's at the heart of the case?" We do not find any implication of deliberate wrongdoing by defense counsel in this statement. Instead, the prosecutor is simply reminding the jury, in neutral terms, that a child witness might be susceptible to confusion. Similarly, the prosecutor's comment that A.B. was worn down by defense counsel's questions was not improper. Again, the prosecutor was merely suggesting that the jurors take into account all the circumstances surrounding the testimony.

On this record, we find no plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

C. Appeal to Sympathy

Defendant next asserts that the prosecution repeatedly implied that the jury had a responsibility to protect children and that defendant had violated the "sacred trust" that exists

between children and adults. According to defendant, such comments were merely an attempt by the prosecution to appeal to the jury's sympathy. It is well established that a prosecutor may not urge a jury to convict out of sympathy for the victim. See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

To the extent that the remarks did tend to evoke sympathy, such argument is not prejudicial where, as here, the bulk of the prosecutor's arguments were properly tied to the evidence and applicable law. See *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988). Moreover, a timely objection and special instruction would have cured any improper prejudice. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).²

Defendant further predicates this claim of error on portions of the prosecutor's argument emphasizing that the two complainants displayed courage, had no reason to fabricate their accounts, and suffered unpleasant changes in their personal living circumstances as a consequence of coming forward. In light of defense counsel's repeated attempts to portray this trial as being similar to the Salem Witch trials, the prosecutor was entitled to emphasize the disincentives his two presumably nervous and youthful complaining witnesses faced in testifying against defendant.

Defendant has not established that the prosecutor's comments in this instance amounted to plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

D. Civic Duty

Defendant argues in passing that "the prosecutor encouraged the jurors to go outside the evidence and decide the case on the basis of their desire to send a message to the community and to protect all children." "Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). However, defendant fails to cite any portion of the record to support his claim. To the extent defendant premises this argument on the same statements he alleges amounted to an improper appeal for juror sympathy, we find no error. A prosecutor need not confine argument to the "blandest of all possible terms." *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). Further, any impropriety was cured when the trial court instructed the jury that arguments of counsel are not evidence. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).³

² We note that the trial court instructed the jury not to let sympathy affect its verdict. See *Graves*, *supra* at 486.

³ Defendant alleges that his counsel was ineffective for failing to object to these instances of alleged prosecutorial misconduct. Ineffective assistance of counsel requires defendant to show that but for his counsel's error the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Absent any finding of prosecutorial misconduct affecting defendant's substantial rights in this case, we conclude that defendant has failed to meet this burden. *Id.*

V. Sentencing

Defendant ultimately challenges the factual bases for the trial court's scoring of offense variables 10, 11, and 13.⁴ "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court's scoring decision will be upheld on appeal if there is any supporting evidence in the record. *Id.* This Court reviews a sentencing court's factual findings for clear error. MCR 2.613(C), see also *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000), citing *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). However, the proper application of the statutory guidelines presents a question of law that we review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

A. OV 10

Defendant was assessed fifteen points for OV 10. Fifteen points are assessed for an offender who engages in predatory conduct. MCL 777.40(1)(a). The statute defined predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Defendant contends that the evidence in this case only warrants a score of ten points for the exploitation of a victim's youth or other special vulnerability. MCL 777.40(1)(b). We disagree.

According to the evidence, defendant did not spontaneously seize some opportunity to take advantage of the young victims in his household. A.B. described how defendant repeatedly escorted her to his otherwise unoccupied bedroom. By removing A.B. to a location of greater seclusion, thus rendering A.B. more helpless, defendant engaged in preoffense conduct aimed at A.B. for the primary purpose of victimization. MCL 777.40(3)(a). On this record, the trial court did not err in assessing fifteen points for OV 10.

B. OV 11

The trial court assessed defendant fifty points for OV 11, which concerns sexual penetration. This point total is assessed where two or more criminal acts of sexual penetration occur. MCL 777.41(1)(a). Courts are specifically instructed to "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). However, the statute further provides that points are *not* to be scored "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c). Defendant argues that this statutory language commands a score of zero for OV 11 in this instance.

⁴ The statutory guidelines apply in this case because the crime was committed after January 1, 1999. MCL 769.34(2).

Defendant initially asserts that the trial court agreed to only consider the testimony adduced at trial or the preliminary examination.⁵ In fact, the trial court actually stated that “the scope of information” for scoring the sentencing information report was not limited to “those matters that are adduced at a trial, or preliminary examination.” The trial court then cited the work of the investigator who prepared defendant’s presentence investigation report, who described defendant’s conduct in successfully pressuring A.B. to perform fellatio on him four separate times. The trial court clearly relied upon this information when scoring OV 11.

Defendant opines that the jury, not the trial court, should have made all the factual determinations attendant to defendant’s sentencing that were used to increase defendant’s penalty. However, there is no requirement that a jury find the facts that form the basis for determining a defendant’s minimum sentence. See *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991). A scoring decision will not be reversed if any evidence exists to support the score. *Hornsby, supra* at 468.⁶

Defendant further asserts that because each alleged act of sexual misconduct represents a separate offense, they should be analyzed independently during sentencing. As discussed in *People v Mutchie*, 251 Mich App 273, 280; 650 NW2d 733 (2002), “MCL 777.41(2)(c) indicates an intent to exclude only *one* sexual penetration. . . . [T]he Legislature acted to exclude, as an aggravating offense factor, a factor (sexual penetration) already given weight as an element of the sentencing offense”⁷ (Emphasis added). Accordingly, under OV 11 the trial court may score the remainder of the sexual penetrations of the victim by the offender that arose out of the sentencing offense, “regardless of whether the sexual penetrations result in separate convictions.” *Mutchie, supra* at 281. Consequently, the trial court in the instant case was only obliged to exclude the single penetration that constituted an element of the first count of first-degree criminal sexual conduct when scoring OV 11. Thus, the trial court was free to consider the remaining penetrations that arose from the general course of conduct attendant to that offense. *Id.* at 277.

Because the record in this case indicates a total of four penetrations involving A.B., the trial court had a sufficient evidentiary basis for assessing fifty points for OV 11.

⁵ A.B. only described two acts of oral penetration when she testified at trial and during the preliminary examination.

⁶ Defendant’s reliance on *Apprendi v New Jersey*, 530 US 466, 120 S Ct 2348; 147 L Ed 2d 435 (2000), is misplaced. In that case, the United States Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490 (emphasis added). Because first-degree CSC is punishable by life or any term of years, MCL 750.520b(2), the trial court’s scoring of the guidelines did not result in a penalty exceeding the statutory maximum.

⁷ While the Court in *Mutchie, supra*, declared this issue moot, it addressed it in some detail nonetheless. Although, strictly speaking, this rendered *Mutchie*’s substantive analysis *dicta*, we have no inclination to deviate from its reasoning or conclusions.

C. OV 13

The trial court also awarded defendant fifty points for OV 13, which addresses continuing patterns of criminal behavior. Fifty points is assessed under OV 13 when the offense in question “was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age.” MCL 777.43(1)(a). However, the instructions for scoring OV 13 also state that “[e]xcept for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.” MCL 777.43(2)(c). A review of the record in the instance case reveals that the trial court considered the same conduct when scoring both OV 11 and OV 13. Consequently, the trial court erred when in assessed fifty points for OV 13.

Nevertheless, defendant could properly be scored twenty-five points under OV 13 on the basis of his several acts of second-degree criminal sexual conduct. MCL 777.43(1)(b). Indeed, defendant’s conviction on eight counts of second-degree criminal sexual conduct in this case provides ample proof of a “pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). We note that adjusting defendant’s score by twenty-five points will not affect his offense variable level. Thus, resentencing for this error is not required. MCL 769.34(10). Accordingly, we remand this case for correction of defendant’s sentencing information report.

Affirmed, but remanded for correction of the sentencing information report. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly